IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 337 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SACHIN MADHAVLAL PATEL (NOT PRESS THE APPLICATION & 1 - Applicant(s)

Versus

BRIJESH SOMABHAI PATEL PROP. OF B.R. PATEL & CO.) & 1 - Respondent(s)

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Appearance :
MR SA BAQUI for Applicant(s) : 1 - 2.
MR DM AHUJA for Respondent(s) : 1,
PUBLIC PROSECUTOR for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 08/08/2007

ORAL JUDGMENT

Rule. Shri Ahuja, learned advocate waives service of rule on behalf of the respondent No.1 and ld. APP waives

service of rule on behalf of the respondent State.

2. By way of this petition under Article 227 of the Constitution of India, the petitioners, original accused Nos.1 and 2 have prayed to quash and set aside the order dated 28-12-06 passed below Exh-32 in Criminal Case No.249/02 passed by the ld. JMFC, 2nd Court, Ahmedabad Rural, Ahmedabad and in the alternative to quash the process issued against the petitioner No.2 in Criminal Case No.249/02.

3. At the outset, Shri Baqui, learned advocate appearing on behalf of the petitioners has submitted that the petitioners do not press the present petition qua petitioner No.1 herein, - original accused No.1 and has also further submitted that the petitioner No.1 will appear before the learned trial Court through his advocate on the next date of hearing and he will complete the cross examination of the complainant and will fully cooperate the learned trial Court for early disposal of the aforesaid criminal case and will not ask for any unnecessary adjournment. Statement of Shri Baqui, learned advocate appearing on behalf of the petitioners is recorded and the petitioner No.1 is directed to act accordingly.

4. The complaint being Criminal Case No.249/02 is filed by the respondent No.1 herein, original complainant against the petitioners, original accused Nos.1 and 2 in the Court of ld. JMFC, Court No.2, Ahmedabad Rural, Ahmedabad for the offence u/s 138 of the Negotiable Instrument Act (for short “the NI Act”) alleging inter alia that original accused No.1, - petitioner No.1 herein is the son of the petitioner No.2, original accused No.2(for short “the petitioner No.2) and they were in

need of finance of Rs.10 lacs and therefore, the petitioners and his another son Chirag approached the complainant and on assurance that the finance amount would be returned to the complainant by cheque and as and when the cheque is deposited, the same will be accepted and honoured and relying upon the said assurance, Rs.5 lacs was given to the petitioner No.1 herein and against which the petitioner No.1 herein has given one cheque dated 16-6-2001 for an amount of Rs.5 lacs with an assurance that as and when the said cheque is deposited, the same will be honoured. It is averred in the complaint that when the said cheque was deposited, in fact, the same has been returned and the petitioners were informed accordingly and they again told the complainant to redeposit the said cheque and accordingly the said cheque was redeposited and again the same was returned dishonoured on 7-12-2001. It is further averred in the complaint that when the cheque was returned, the complainant approached the petitioners, they have threated the complainant and abused the complainant, for which a criminal complaint is filed in the Court of ld. Metropolitan Magistrate, Court No.10, Ahmedabad for the offence u/s 406, 420, 294-B and 114 of the IPC. It is averred in the complaint that subsequently as the cheque was returned, a statutory notice was given to the petitioners which came to be received by them on 18-12-01. However, the petitioners gave evasive reply and did not make the payment and therefore, the respondent No.1, original complainant has preferred the aforesaid complaint being criminal case No.249/02 in the Court of ld. JMFC, Court No.2, Ahmedabad Rural for the offence u/s 138 of the NI Act and in the same, the learned trial Court has issued summons against the petitioners for the offence u/s 138 of the NI Act. Being aggrieved by the same, the petitioners submitted an application below Exh-

32 before the learned trial Court for discharge and/or dropping the proceedings against the petitioners. However, as the said application was not maintainable, the learned trial Court dismissed the said application on 28-12-06 and hence, the petitioners have preferred the present petition under Article 227 of the Constitution of India for the aforesaid relief.

5. Shri Baqui, learned advocate appearing on behalf of the petitioner No.2, original accused No.2 has submitted that the petitioner No.2 has not committed any offence as alleged u/s 138 of the NI Act and only as the petitioner No.2 is the father of the original accused No.1, he has been shown as accused with further allegation that at the time of finance, the petitioner No.2 has accompanied the original accused No.1. It is further submitted by him that the petitioner No.2 is neither the signatory to the cheque nor has taken any loan/finance from the complainant, therefore, there is no debt. It is further submitted that as the petitioner No.2 is neither the signatory nor has issued any cheque and the amount was not due and payable by the petitioner No.2, no case is made out against the petitioner No.2 for the offence u/s 138 of the NI Act and therefore, to continue the criminal proceedings against the petitioner No.2 would be abuse of process of law as the petitioner No.2 would have to unnecessary undergo the trial and undergo unnecessary harassment. Therefore, it is requested to quash and set aside the process/summons issued against the petitioner No.2. Shri Baqui, learned advocate appearing on behalf of the petitioner No.2 has relied upon the unreported decision of the learned Single Judge of this Court dated 4-10-2005 rendered in Criminal Misc. Application No.4472 of 2005 in support

of his prayer and submission to quash the process issued against the petitioner No.2. He has also relied upon another decision of the learned Single Judge in the case of Mafatlal Swarupchand Thakkar V. State of Gujarat reported in 2000(1) GLH UJ 1 by further submitting that as held by the learned Single Judge when the complaint clearly shows that an accused in wrongly implicated, a petition cannot be jettisoned on the ground of delay or on the technical ground that facts can be pleaded before the trial Court. Therefore, it is requested to allow the present petition and to quash and set aside the impugned complaint qua the petitioner.

6. On the other hand, Shri DM Ahuja, learned advocate appearing on behalf of the respondent No.1, - original complainant while opposing the present petition has submitted that the averments, allegations and contentions made on behalf of the petitioner are all the defences which are requires to be considered at the time of trial. It is further submitted that technical grounds or arguments can be raised at the trial. It is further submitted that the petitioner No.1 is the son and the petitioner No.2 is the father of the petitioner No.1 and the petitioner No.2 has abetted the petitioner No.1 in making false representation before the complainant that if the cheque is given in the name of the petitioner No.1, it will be honoured. It is also further submitted that the averments made in the complaint and the examination-in-chief clearly constitutes an offence under section 114 of the IPC against the petitioner No.1 and petitioner No.2 and therefore, there is no

question of quashing the complaint against the petitioners. It is also further submitted by him that as such the examination-in-chief of the complainant is already over. However, as the petitioners have not appeared, the cross-examination of the complainant is not conducted and as there is non-cooperation on the part of the petitioners, the petition be dismissed. Shri MR Mengdey, ld. APP appearing for the State has requested to pass appropriate order considering the averments in the complaint.

7. Heard the learned advocates appearing on behalf of the parties.

8. At the outset, it is required to be noted that the present petition is required to be considered only qua the petitioner No.2 herein as the present petition is not pressed qua the petitioner No.1 herein, original accused No.1. It is also required to be noted that the summons have been issued against the petitioners in criminal case No.249 of 2002 by the learned trial Court only for the offence u/s 138 of the NI Act. On bare reading of the complaint and the averments and allegations, it appears that the petitioner No.2 is arrayed as an accused by alleging inter alia that at the time of taking loan, the petitioner No.2, who is the father of the petitioner No.1, has given assurance and therefore, the finance was given. It is required to be noted that admittedly the cheque in question is given by the petitioner No.1, original accused No.1 who is the signatory of the said cheque which has been dishonoured. On bare reading of the complaint as a whole and taking it as on face value, no case is made out against the petitioner No.2 for the

offence u/s 138 of the NI Act. It is also to be noted that the learned trial Court has issued the summons against the petitioner only for the offence u/s 138 of the NI Act and till date, no summonses has been issued for the offence u/s 114 of the IPC and/or other provisions of the IPC and therefore, this Court is not required to consider at present with regard to allegations against the petitioners for the other IPC offence. Thus, when the cheque was issued by the petitioner No.1 in its individual capacity and the said cheque has been dishonoured, it cannot be said that the petitioner No.2 has committed the offence u/s 138 of the NI Act. Under the circumstances, the learned trial Court has committed an error in issuing summons against the petitioner No.2 for the offence u/s 138 of the NI Act. To continue the criminal proceedings against the petitioner No.2 for the offences u/s 138 of the NI Act would be unnecessary harassment to him and the same can be said to be abuse of process of law. Under the circumstances, the impugned complaint qua the petitioner No.2 requires to be quashed and set aside.

9. For the reasons stated above, the petition succeeds in part. The criminal case No.249/02 pending in the Court of ld. JMFC, 2nd Court, Ahmedabad Rural, Ahmedabad is quashed and set aside qua the petitioner No.2 and the process/summons issued by the learned trial Court is also quashed and set aside qua the petitioner No.2. As agreed by the petitioner No.1 and as stated by Shri Baqui, learned advocate appearing on behalf of the petitioner No.1, he shall appear before the trial Court on the next date of hearing and will complete the cross-examination of the complainant and will not ask for unnecessary adjournments. The learned trial Court is directed to complete the trial as early as possible, preferably

within a period of nine months from the date of receipt of this order and all concerned are directed to cooperate the learned trial Court in early disposal of the aforesaid case. Rule made absolute accordingly.

(M.R. Shah, J.)

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